

EXHIBIT 9

CLERK OF CLERK OF STATE

03 MAR 24 PM 3: 15

CLARENCE W. BROWN, CLERK
RICHMOND COUNTY, GA.

[illegible]

) Civil Action No. 2003-RCCV-728

The above-styled matter is before the Court on Defendant's Motion for Summary Judgment.¹ This matter came on for a hearing before the Court on January 20, 2004. Now the Court, after consideration of the arguments of counsel and the record, finds that genuine issues of material fact remain in the instant case, which precludes the entry of judgment as a matter of law.

WHEREFORE IT IS ORDERED that the aforesaid Motion for Summary Judgment be and the same is hereby DENIED.

SO ORDERED, this 10th day of March, 2004

William M. Fleming, Jr.
Judge, Superior Court
Augusta Judicial Circuit

¹ Initially, this Court was also considering Plaintiff's Cross Motion for Summary Judgment. However, since Plaintiffs filed their Notice to Withdraw Cross Motion for Summary Judgment on February 26, 2004, consideration of said motion is not necessary.

CERTIFICATE OF SERVICE

I do hereby certify that on this day I served the following with a copy of an **order denying Defendant's Motion for Summary Judgment** by causing a copy of same to be deposited in the U.S. mail, postage prepaid, addressed as follows:


Kevin S. Little, Esq
3100 Centennial Tower
101 Marietta Street
Atlanta, GA 30303

Jay D. Brownstein, Esq.
2010 Montreal Rd.
Tucker, GA 30084

Mark D. Lefkow, Esq.
Nall & Miller, LLP
Suite 500, North Tower
235 Peachtree Street, NE
Atlanta, GA 30303-1401

Robert B Hocutt, Esq
Nall & Miller, LLP
Suite 500, North Tower
235 Peachtree Street, NE
Atlanta, GA 30303-1401

This 22 day of March, 2004.



Heidi Adams
Law Clerk to
Hon William M. Fleming, Jr.

EXHIBIT 10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPERIOR COURT OF RICHMOND COUNTY
STATE OF GEORGIA

MATTISON R. VERDERY, C.P.A.,)
P.C., INDIVIDUALLY AND ON)
BEHALF OF ALL PERSONS AND) CIVIL ACTION FILE
ENTITIES SIMILARLY SITUATED,) NO. 2003-RCCV-728
Plaintiffs,)
vs.)
STAPLES, INC. AND QUICK LINK)
INFORMATION SERVICES, INC.,)
Defendants.)

COPY

MOTION FOR TEMPORARY RESTRAINING ORDER

Held Before the Honorable Carl C. Brown, Jr.
Judge of Superior Court, Augusta Judicial Circuit
At the Augusta-Richmond County Municipal Building
Hearing Room 319, Third Floor
530 Greene Street, Augusta, Georgia
On Tuesday, April 27th, 2004, Commencing at 11:07 a.m.

APPEARANCES OF COUNSEL

For the Plaintiffs: MR. JAY D. BROWNSTEIN
MR. KEVIN S. LITTLE
MR. HARRY D. REVELL
For the Defendants: MR. MARK D. LEFKOW

KIMBERLY M. CLAYTON, CCR, CVR
Official Court Reporter, Augusta Judicial Circuit
Augusta-Richmond County Municipal Building
530 Greene Street, Room 316-A
Augusta, Georgia 30911
(706) 821-2364

1 **APPEARANCES OF COUNSEL**

2
3 For the Plaintiffs:

MR. JAY D. BROWNSTEIN
Brownstein & Nguyen, LLC
2010 Montreal Road
Tucker, Georgia 30084
(770) 458-9060

6
7 MR. KEVIN S. LITTLE
Attorney At Law
3100 Centennial Tower
101 Marietta Street
Atlanta, Georgia 30303
(404) 979-3171

10
11 MR. HARRY D. REVELL
Burnside, Wall, Daniel, Ellison
& Revell
454 Greene Street
Augusta, Georgia 30901
(706) 722-0768

14
15 For the Defendants:

16 MR. MARK D. LEFKOW
Nall & Miller, LLP
Suite 1500, North Tower
235 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 522-2200

18 - - - - -

INDEX TO PROCEEDINGS

	<u>Page</u>
ARGUMENT BY MR. LEFKOW	6
RESPONSE BY MR. REVELL	30
RULING OF THE COURT	44
CERTIFICATE OF COURT REPORTER	68

- - - - -

1 PROCEEDINGS

2 [Tuesday, April 27th, 2004, Commencing at 11:07 a.m.]

3 THE COURT: Let's go then to the matter of Verdery vs.
4 Staples, et al. And this is a motion for a TRO brought by
5 Staples, et al., represented by Mr. Lefkow; is that --

6 MR. LEFKOW: Lefkow [different pronunciation].

7 THE COURT: Lefkow, all right. Are you ready to
8 proceed?

9 MR. LEFKOW: Yes, Your Honor.

10 THE COURT: All right. And --

11 MR. REVELL: Your Honor, if I may, I'd like to state an
12 objection before we start the proceeding --

13 THE COURT: All right.

14 MR. REVELL: -- as to the way it's been scheduled and
15 unfolding. I want the record to be sure that I object to
16 the procedure.

17 THE COURT: All right, let me do this first. And
18 pardon me, Mr. Revell. This shall be reported under our
19 rules?

20 MR. REVELL: Yes, sir.

21 THE COURT: All right. You may continue.

22 MR. REVELL: Your Honor, last week Mr. Lefkow was kind
23 enough to, by e-mail, send me a copy of his application, the
24 document we're here on today, which is styled an Application
25 for Temporary Restraining Order and Interlocutory Injunction

1 and Motion for Stay of Proceedings for Lack of Subject
2 Matter Jurisdiction, and told me he was filing that and
3 wanted to give me a heads up about it. And -- which was
4 fine, I appreciated that and he did send it to me. That was
5 last -- April 20th, which I think was a week ago today
6 perhaps. Thereafter, either that same conversation or maybe
7 later that day or the next day, he indicated that he had
8 scheduled a hearing before you for this morning, presumably
9 on that application, which I again said was fine. My
10 schedule was clear.

11 He came down last week and presented a rule nisi to you
12 and, again in all deference to him, told me he was coming.
13 And I asked him what the purpose of his visit to you was,
14 and he said just simply to present a rule nisi scheduling
15 the hearing for today. And I again said fine. I have --
16 we routinely do that, have rule nisi to schedule a hearing.
17 No reason for me to come over and object.

18 However, when I got the rule nisi, the rule nisi does
19 not say we're here for a hearing on a temporary restraining
20 order. Instead, the rule nisi says we're here for an
21 interlocutory injunction hearing and a motion for stay of
22 proceedings. And I strenuously object to being hauled in
23 here on a motion for interlocutory injunction or a motion
24 for stay of proceedings without having the thirty-day period
25 that the code section provides us in which to respond.

1 I have no objection to being here for a temporary
2 restraining order hearing that was represented to me by not
3 only the filing, but when that was being scheduled I
4 naturally assumed we were scheduling a hearing on a TRO. I
5 have no objection to that.

6 THE COURT: What about that, Mr. Lefkow?

7 MR. REVELL: But I object to the injunction motion
8 hearing.

9 MR. LEFKOW: A couple of things, and I can have this
10 faxed from my office, Your Honor, if I may have a moment
11 after this. I notified both counsel -- actually, I called
12 Mr. Revell at home and I notified Mr. Brownstein that I was
13 seeking a rule nisi on the motion to stay proceedings.
14 There was no objection. He said so long as I was not going
15 to get a temporary restraining order ex parte, that was
16 fine. The legal effect of that, I believe, is to shorten
17 the time to respond that -- I mean, that's why I think we're
18 arguing this point. But I can have that faxed from my
19 office. That was specifically what I told him I would be
20 going to seek.

21 There are reasons that I wanted to seek it, a hearing,
22 this quickly. We believe that Staples' kind of corporate
23 life is at stake in some respects. This is a suit seeking
24 between \$2.2 billion and \$6.7 billion, and there's no
25 subject matter jurisdiction. We are on the verge of being

1 forced to comply with onerous class discovery for a case
2 where this court lacks subject matter jurisdiction. Staples
3 should not be required to suffer that. Their shareholders
4 should not be required to suffer that. Their employees
5 should not be required to suffer that, many of whom reside
6 here in Augusta, should not be required to suffer that.

7 THE COURT: But wouldn't, though, they be entitled to
8 the thirty days that generally is allowed for that to be
9 considered? I mean, why shouldn't we just address the issue
10 of the TRO today and then they are allowed the statutory
11 period to respond?

12 MR. LEFKOW: There are procedural issues with that,
13 Your Honor, and I think there are appellate issues with that
14 as well. And the reason that I wanted them both was because
15 there are different avenues for appeal of each different
16 type of motion. And I wanted to get them all heard because
17 we want to give this Court and this jurisdiction every
18 opportunity to say stop, we're going to stop. We're not
19 going to exercise jurisdiction. We are not going to force
20 Staples and Quick Link, which is my other client, to produce
21 class discovery for a case where there is no subject matter
22 jurisdiction. So, I wanted to give the Court every
23 opportunity to say stop.

24 There is a case out there, Your Honor, if I may, which
25 indicates that this would be ripe for review. There was no

1 deception of Mr. Revell, and I can have it faxed directly
 2 from my office. It is ripe for review of a rule nisi
 3 issues, and that was a case where seven days' notice was
 4 given. Because of the harm that could be occasioned by the
 5 failure to grant a temporary restraining order or
 6 interlocutory injunction, and because of Staples' need to,
 7 if, you know, it does not get the relief that it needs to
 8 -- essentially to unburden itself with the burdens which
 9 the court in this jurisdiction has cast upon them, despite
 10 the subject matter jurisdiction issues, there are alternate
 11 avenues for relief which we're reluctant to take and don't
 12 want to do. And we believe that -- that this should be
 13 done and set in place before any of this happens or could
 14 happen.

15 **THE COURT:** All right. What about that, Mr. Revell?

16 **MR. REVELL:** Your Honor, all that's -- I agree with
 17 everything's he said. The problem is the TRO, if he is
 18 entitled to a TRO, he's protected from all the so-called
 19 harm he fears. The TRO, if it's granted today, gives him
 20 everything he needs, and then an interlocutory injunction
 21 follows on the heels of that after our response time. So
 22 his sky-is-falling argument is the same one for a TRO.

23 My objection is to being served with an application
 24 for a TRO and set a hearing scheduled, and then get a rule
 25 nisi that doesn't even say anything about a TRO. That's my

1 objection.

2 THE COURT: All right. Well, let's consider the TRO
3 today.

4 MR. REVELL: All right, sir. Thank you.

5 THE COURT: All right.

6 MR. LEFKOW: Well, perhaps, Your Honor, if we could
7 after, you know, if there's any indication of a ruling, we
8 could discuss it further.

9 THE COURT: All right. Well, let's consider the TRO.

10 MR. LEFKOW: Sure.

11 This case comes before the Court, Your Honor, in a case
12 under the Telephone Consumer Protection Act, which probably
13 has root its head in this jurisdiction quite a bit a little
14 bit with -- beginning with a case against Hooters, which was
15 repeatedly sending faxes to random persons who did not want
16 to receive any faxes from Hooters. This action, however, is
17 by Mattison Verdery, C.P.A., P.C., which is -- which was,
18 prior to receipt of the facsimile which is at issue in this
19 case, an existing customer of Staples. Staples is an office
20 supply store which has an office here in -- or has a store
21 here in Augusta. It is essentially, I will refer to it as
22 Mr. Verdery, because it is essentially a one-man operation,
23 from what I understand, a chartered public accountant
24 operation.

25 Mr. Verdery alleges that he received a facsimile in

1 March of 2003. And that date is kind of important in that
2 at that time the FCC, Federal Communications Commission, had
3 ruled consistently for eleven years that facsimile
4 advertisements sent to existing customers was proper and was
5 proper under their rules under the Telephone Consumer
6 Protection Act of 1991.

7 Why -- you know, earlier on I said Staples and Quick
8 Link's corporate life is somewhat at stake and that this is
9 an action seeking between \$2.2 billion and \$6.7 billion.
10 And the reason that is so high is because the FCC said so.

11 I want to go over a little bit the binder that I
12 prepared for Your Honor. Initially I want to point the
13 Court out to, just to confirm what I say this case is,
14 Exhibit 2, on the third page of that exhibit. And that is
15 the plaintiff's --

16 MR. REVELL: Are these the same exhibits with the
17 application or is that a separate set?

18 MR. LEFKOW: It's a separate set of exhibits for the
19 hearing.

20 MR. REVELL: Okay.

21 MR. LEFKOW: Kind of an abbreviated set of exhibits.

22 In Exhibit 2, that is Plaintiff's Brief in Support of
23 Motion for Class Certification, where plaintiff admits prior
24 to receiving the fax the plaintiff had purchased office
25 products and supplies from Staples. In addition, prior to

1 receiving the fax the plaintiff applied for Staples'
2 Business Rewards program. In connection with either making
3 purchases of Staples' products or the Business Rewards
4 application, the plaintiff provided Staples with its fax
5 telephone number.

6 I want to refer the Court to Exhibit 5, and this is a
7 1995 FCC Report and Order. And the FCC is charged with
8 administering the Telephone Consumer Protection Act, which
9 is part of a broader act which they administer called the
10 Telecommunications Act of 1934. The 1995 Memorandum Opinion
11 and Order in Exhibit 5, on the second page of that exhibit
12 in the highlighted portion states, the report and order
13 makes clear that the existence of an established business
14 relationship establishes consent to receive telephone
15 facsimile advertisement transmissions.

16 So the FCC has authorized this type of activity,
17 sending faxes to existing customers. And they've done it
18 over -- since 1992 as a matter of fact. And the 1992
19 portion of the order is in the exhibits which are attached
20 to the application. But for purposes of this hearing, it
21 should be noted that in 1995 that was the FCC's position.
22 It's absolutely clear you can do this.

23 And just to further emphasize that point, in Exhibit 4
24 on the third page, the FCC has defined established business
25 relationship very broadly and --

1 THE COURT: I'm sorry, which --
2 MR. LEFKOW: Exhibit 4.
3 THE COURT: 4, okay.
4 MR. LEFKOW: And it is the third page. And this is in
5 the regulations, 47 C.F.R. § 64.1200 and it is at (f)(4).
6 The term established business relationship means a prior
7 existing relationship formed by a voluntary two-way
8 communication between a person or entity and a residential
9 subscriber with or without an exchange of consideration, on
10 the basis of an inquiry, application, purchase or
11 transaction by the residential subscriber regarding products
12 or services offered by such person or entity, which
13 relationship has not been previously terminated by either
14 party.
15 Now, in Exhibit 3 you'll see some testimony from Mr.
16 Verdery, again confirming that this is exactly what this
17 case is about, that it is contrary to FCC rules, the relief
18 sought in this case. Mr. Verdery was asked on the second
19 page of your exhibit, Your Honor, in the first captioned
20 part, "Prior to receipt of the facsimile --" on page 16.
21 "Prior to receipt of the facsimile in this litigation, did
22 you ever do anything to indicate to Staples that you did not
23 want to receive facsimiles from Staples?" And he asked if I
24 meant -- "Did I expressly fill out something saying I didn't
25 want, is that what your question is?" "Question: Correct."

1 "Answer: Not that I recall." Page 17, "And prior to the
2 receipt of the facsimile issued in this litigation, had you
3 done business transactions with Staples at that rate, 12
4 times per year?" And the answer is, "That's approximate."
5 So he's admitted that prior to receipt of the fax, not only
6 has he admitted in deposition but he's admitted it in
7 motions, that he was an existing customer of Staples.

8 So, why are we here? Plaintiff Mr. Verdery is seeking
9 class action relief. He's seeking to certify a class of
10 thousands of people for what is, Staples estimates is
11 between \$2.2 and \$6.7 billion worth of relief to
12 retroactively remove the FCC's rulings on these issues
13 and to overrule the FCC's rulings on this issue.

14 The most recent definitive order of the FCC was issued
15 in August of 2003. And some explanation is necessary as to
16 what the FCC has done and the history. In July of 2003,
17 they reversed their prior conclusion that you could send --
18 businesses can send facsimile advertisements to their
19 customers and that is sufficient for consent. They said,
20 the FCC stated, well, from now on we are going to require a
21 signed writing and that will be effective as of, I believe
22 the initial date was August of 2003.

23 In Exhibit 6, on August 18th, 2003, it is important to
24 note the nature of the order which the FCC issued, and it is
25 called an Order on Reconsideration. There were a number of

1 folks who petitioned for this, including class-action
2 lawyers such as the ones in Georgia. Mr. Revell, as far as
3 I know, and I've looked through the FCC dockets, was not a
4 party to these proceedings. Mr. Verdery was not a party to
5 these proceedings because he did not choose to make himself
6 a party to these proceedings.

7 If you look on the second page, you'll see a number of
8 petitions. Petition for stay, request for stay, petition
9 for emergency stay of the new FCC rules, petition for
10 emergency clarification. On page 3 the FCC, in paragraph 5,
11 indicated, we now on our motion issue this limited
12 reconsideration on the effective date of our determination
13 that an established business relationship will no longer be
14 sufficient to show that an individual or business has given
15 express permission to receive unsolicited facsimile
16 advertisements. And there are some indication that many
17 organizations need additional time to comply.

18 So in note 24, what the FCC did is they indicated as
19 follows: We emphasize that our existing TCPA rules
20 prohibiting the transmission of unsolicited advertisements
21 to a telephone facsimile machine will remain in effect
22 during the pendency of this extension. Under these rules,
23 those transmitting facsimile advertisements must have an
24 established business relationship or prior express
25 permission from the facsimile recipient to comply with our

1 rules. A little bit below they indicate that the extension
2 is good through January 1st, 2005. So the FCC, by order
3 under the Telecommunications Act, has indicated that until
4 January 1st, 2005, businesses may continue to send facsimile
5 advertisements to their existing customers.

6 And I want to direct the Court to the last page of
7 this, these are the ordering clauses of the FCC. It is
8 further ordered that the effective date for the commission's
9 determination that an established business relationship will
10 no longer be sufficient to show that an individual or
11 business has given express permission is -- go a little bit
12 further there, is January 1st, 2005, and that this order on
13 reconsideration is effective upon publication in the Federal
14 Register.

15 Now, to the extent that the plaintiff, through Mr.
16 Revell or any of his other counsel, is going to contend that
17 they are not advocating for the overruling of this rule and
18 the FCC's orders, they are incorrect and they contradict
19 themselves. I want to direct the Court to Exhibit 8, which
20 is plaintiff's reply brief in response to a motion for
21 summary judgment. And if you see page 4 of that packet, of
22 Exhibit 8, the subject line for the first argument they
23 make, "There is no established business relationship
24 exemption to the TCPA's ban of unsolicited fax
25 advertisements." On the next -- very next page the

1 plaintiffs again indicate, because the FCC lacked the
 2 authority to establish an exemption to junk fax liability,
 3 and because the established business relationship exemption
 4 championed by defendants is directly contrary to the clear
 5 language and intent express by Congress, this court should
 6 find and declare that no such exemption exists. The
 7 plaintiffs are asking you to step on the toes of the Federal
 8 Communications Commission, Your Honor. Again on page 7,
 9 Congress did not authorize the FCC to create any further
 10 exemptions, and that goes on and on throughout their briefs
 11 in this case, Your Honor.

12 We have filed this motion, Your Honor, we filed a
 13 motion for summary judgment, which was not initially based
 14 on subject matter jurisdiction, it initially raised the FCC
 15 orders, which is the proper thing to do. And the plaintiff
 16 defended, well, we're not -- you should declare that these
 17 exemptions created by the FCC don't exist. That was their
 18 response. Our response was, well, there is this issue of
 19 subject matter jurisdiction, and that was in a reply brief
 20 to the motion for summary judgment. This motion before this
 21 Court today is a motion for a restraining order, a motion
 22 for stay, and a motion for an interlocutory injunction,
 23 depending on what the Court decides to proceed with.

24 The great thing about subject matter jurisdiction, Your
 25 Honor, from a prospective of bringing a motion, is that it's

1 always timely. It doesn't matter what judge is listening to
2 it, it can never be -- no court can take subject matter
3 jurisdiction over a case in which it has no subject matter
4 jurisdiction, regardless of what any other judge has said,
5 ruled, unless it's a -- unless it's binding authority.

6 And this is a case from the court of appeals. And the
7 Court can do this on its motion. The Court can dismiss. It
8 could do anything it deems proper to address the subject
9 matter jurisdiction issue, regardless of what proceedings
10 are pending before it. And in this case, *First United*
11 *Church vs. Udofia*, at 223 Ga. App. 849, the trial court
12 stated that it was obliged to inquire into its own juris- --
13 the trial court -- I'm sorry. The court of appeals stated
14 the trial court was obliged to inquire into its own
15 jurisdiction as a threshold matter, even if the defendants
16 failed to properly raise this issue below. A civil court
17 cannot take jurisdiction of an ecclesiastical issue even if
18 the parties present it for resolution, because the First
19 Amendment prohibits such action by the civil judicial
20 system. Courts do not have the power to extend their
21 jurisdiction, which is set by constitutional or statutory
22 law. It may not be waived by the parties or the court.
23 So, all this talk about when I'm raising anything really is
24 -- has no application to a subject matter jurisdiction
25 challenge.

1 If you look at Exhibit 11, it does not appear that
2 Judge Fleming, in the summary judgment order, addressed the
3 subject matter jurisdiction issue, in Exhibit 11. There is
4 a pending motion for reconsideration. Not on the subject
5 matter jurisdiction issue per se, it is on the fact that the
6 Court of Appeals of Georgia issued an opinion which
7 essentially recognized the validity of the FCC rulings.
8 And in some respects that decision, the result was correct,
9 but it acted as a -- a state court acted as a reviewing
10 court, and I don't know that that was proper. So the court
11 of appeals withdrew that opinion and we are kind of stuck
12 under, without any real remedy in the court of appeals.

13 So within -- after that opinion was withdrawn, within
14 -- today is the 26th [sic], that's eight days -- or, no, I'm
15 sorry, thirteen days of that opinion we're here for a
16 hearing. Within five days we filed our petition. And what
17 we're trying to do in a lot of respects is create a record,
18 that we have asked in every way possible for the court to
19 stop.

20 So I want to get into and talk about why this court
21 lacks subject matter jurisdiction. And I want you to look
22 at Exhibit 12, Your Honor, if you can. This is part of an
23 act called the Hobbs Act, and this is at 28 U.S.C. § 2342.
24 And this statute itself is referred to as the Administrative
25 Orders Review Act. And it states, the court of appeals has

1 exclusive jurisdiction, and that's the federal court of
2 appeals, to enjoin, set aside, suspend in whole or in part,
3 or to determine the validity of all final orders of the
4 Federal Communications Commission.

5 There are a number of other agencies as well listed,
6 Secretary of Transportation, Federal Maritime Commission,
7 Atomic Energy Commission. And I can pretty confidently say
8 that this Court has probably had no cases in front of it
9 which have questioned judgments of the Atomic Energy
10 Commission, the Federal Maritime Commission, and the
11 Secretary of Transportation. And there is a specific reason
12 for that, because those cases are not supposed to come to a
13 state court. They are supposed to go directly to a court of
14 appeals. They even bypass district courts. District courts
15 -- there are a number of cases, which we'll talk about,
16 where district courts have to stop. Once they hear that
17 there is an issue over the validity of one of these agency
18 orders, they have to stop. There are two ways of doing it:
19 (a) you can dismiss the case; (b) you can stop the case,
20 stay the case, enjoin further prosecution of the case.

21 The first case I want to refer the Court to is Exhibit
22 13, which is *FCC vs. ITT World Communications, Inc.* And
23 this gives -- this is a twenty-year-old opinion and this is
24 how the FCC works with the courts. And the court, the U.S.
25 Supreme Court, has laid this out pretty clearly as to how

1 it's supposed to work. And the plaintiff in that case filed
2 an action slightly different than this case in that they
3 filed an action directly against the FCC regarding some
4 rules issued by the FCC which the plaintiff contended were
5 ultra vires, which is -- means outside the, as you know,
6 Your Honor, it means outside the FCC's authority, just like
7 the plaintiffs in this case are alleging, that the FCC
8 lacked the authority to do what they did in the first place.

9 And the court, on page 3, addressed this issue pretty
10 squarely. We consider initially the jurisdiction of the
11 district court, because the action was filed in the district
12 court as a declaratory judgment I believe, we consider
13 initially the jurisdiction of the district court to enjoin
14 FCC action as ultra vires. Exclusive jurisdiction for
15 review of final FCC orders, such as the FCC's denial of
16 respondents' rule-making petition, lies in the court of
17 appeals, and then they cite the Hobbs Act. Litigants may
18 not evade these provisions by requesting the district court
19 to enjoin action that is the outcome of the agency's order.

20 That's exactly what's happening in this case. The
21 outcome of the agency's order that it was allowed, their
22 order that businesses could send faxes to their existing
23 customers, this is the outcome of it, that someone did it.
24 Staples did it, Quick Link did it, that is the outcome.
25 And what the plaintiffs in this case are doing is seeking

1 injunctive relief, statutory damages, against the outcome of
2 the FCC's proceedings and their orders.

3 The case cited is an old administrative case, another
4 thirty-year-old case, actually thirty-four-year-old case,
5 called *Port of Boston*. And that is the case cited in this
6 passage by the United States Supreme Court in *FCC vs. ITT*
7 *World*, and that case is important.

8 *Port of Boston* is the next case, in Exhibit 14 in your
9 packet, Your Honor. And that is a little bit more like what
10 the plaintiffs are doing in this case. And instead of
11 filing a direct action against the FCC, the plaintiffs in
12 that case sought to bring the issue of the validity of a
13 Federal Maritime Commission, another agency listed under the
14 Hobbs Act, they attempted to -- the plaintiff attempted to
15 bring the validity of this order before a state court and
16 then the district court in an action between private
17 litigants. And the Supreme Court held that that was
18 patently improper and there were two options that the
19 Supreme Court gave for the district court to do under those
20 circumstances.

21 And if you look on page 3, you see the passage where
22 it shows that Transatlantic, which is a party aggrieved by
23 the Federal Maritime Commission's order, did not seek direct
24 judicial review of the commission's denial of the
25 application for rehearing. Instead, it moved to intervene

1 in this action still pending in district court, which was an
2 action between private litigants. And the district court
3 refused to review the merits of the commission's decision
4 and rendered judgment against the party who was not
5 aggrieved by the Federal Maritime Commission's order.

6 The court, on page 4, begins its analysis of why the
7 court ought to do this and what it ought to do. And I'd
8 like to direct the Court, first, to paragraph two, which is
9 "II," where it states, the district court also concluded
10 correctly that it was without authority to review the merits
11 of the commission's decision. The Administrative Orders
12 Review Act is explicit. The court of appeals has exclusive
13 jurisdiction to determine the validity of such final orders
14 of the Federal Maritime Commission. So, the Supreme Court
15 here is holding if the commission has already ordered
16 something, the district court cannot review it.

17 In paragraph one, the court talks about something
18 called -- or, I'm sorry, paragraph "I" I guess you'd call
19 it, the court talks about something called primary
20 jurisdiction. And primary jurisdiction is a doctrine that
21 is employed when there may be some question as to the
22 application or -- or whether the order applies in this
23 specific situation. And the court thirty-four years ago
24 laid out how courts and administrative agencies are supposed
25 to interact. The court states, this court recognized early

1 in the development of administrative agencies that
2 coordination between traditional judicial machinery and
3 these agencies was necessary if consistent and coherent
4 policy were to emerge. The doctrine of primary jurisdiction
5 has become one of the key judicial switches through which
6 this current has passed.

7 The court goes on to state that this is almost -- this
8 is an almost classic case for engaging in the doctrine. The
9 commission was uniquely qualified to consider the dispute in
10 light of the overall policies concerning terminal
11 conferences and the act that the Federal Maritime Commission
12 administers, Your Honor. The district court did not err in
13 determining in a private suit, in which neither the
14 commission nor the government was a party, would lack the
15 requisite capacity. So the court is essentially laying out
16 thirty-four years ago how administrative agencies and courts
17 are to work together, and that courts are to refer questions
18 invoking the primary jurisdiction of the agency to the
19 agency.

20 Now, if there is no question and the agency has ruled,
21 then the proper procedure is to stop. The district court
22 stopped in this case and that, the court of -- the Supreme
23 Court is approving as the proper procedure. District court,
24 one of -- an Article III court, which does have jurisdiction
25 over certain types of actions such as declaratory actions

1 and regular actions such as contract actions if there's
2 diversity jurisdiction, does not have jurisdiction if a case
3 brings up an issue which questions the validity of an FCC or
4 Federal Maritime Commission or Atomic Energy Commission
5 regulation, order, or rule.

6 And if there's any question with this Court whether
7 this Order on Reconsideration and Report and Order are final
8 orders, the court addresses it on page 5 of *Port of Boston*.
9 In this case the aggrieved party, the person aggrieved by
10 the Maritime Commission's order, argued that it was not a
11 final order. The court stated -- the court essentially said
12 yes, it is, so long as there are legal consequences which
13 flow from the agency action. And so the court stated the
14 relevant considerations in determining finality are whether
15 the process of administrative decision-making has reached a
16 stage where judicial review will not disrupt the orderly
17 process of adjudication and whether rights or obligations
18 have been determined or legal consequences will flow from
19 the agency action. And down at the bottom of page 5, the
20 commission's action was expected to and did have legal
21 consequences.

22 Also on page 5, the court also addresses the argument
23 that the plaintiff in that case made, well, I wasn't a party
24 to that proceeding. And the court says, well, you could
25 have been; you chose not to do so. That is exactly the case

1 in this case, Your Honor.

2 And if the Court is not totally sure that a report and
3 order and an order on reconsideration are final orders under
4 the Hobbs Act, that is again addressed in an FCC case which
5 is Exhibit 15. In that case, twenty-six private telephone
6 companies had appealed some orders of the FCC. Initially,
7 if you see on page 4 of this case, which is *Louisiana Public*
8 *Service Commission vs. Federal Communications Commission*,
9 there were two orders of the FCC at issue. One was a
10 memorandum opinion and order, that's the bottom paragraph on
11 page 4; the other was an order on reconsideration, which is
12 in the second column of page 4. And the court states on
13 page 5, without doubt, exclusive jurisdiction over final FCC
14 orders lies with the court of appeals. And they went on to
15 consider the FCC's memorandum opinions and orders.

16 In Exhibit 16, Your Honor, the proper procedure is laid
17 out for what happens -- this is a Seventh Circuit case, *City*
18 *of Peoria vs. General Electric Cablevision*, what happens
19 when the FCC orders are called into question. And again,
20 this case makes it as clear as all the other cases in the
21 federal courts that once it is asserted, then the proper
22 procedure is to stay the litigation to enable the person who
23 claims to be aggrieved by an FCC order to go to the FCC.

24 On page 3, I think, is the strongest statement to this
25 effect. There was a defense asserted which brought the

1 matter within the regulatory responsibility of the FCC. And
2 -- [reading] the interposing of a defense that brought in
3 matters within the regulatory responsibility of the FCC
4 triggered the doctrine of primary jurisdiction, whereby a
5 suit is interrupted because it involves an issue that
6 Congress wants one of the administrative agencies to have
7 first crack at. Anyone who wants a rule changed must give
8 the FCC a chance to hear his arguments. Now, on page 4, the
9 posture of that case is indicated. On remand, the district
10 court should stay the litigation to enable the party which
11 claims is aggrieved by the FCC order to go to the FCC for
12 the relief it seeks.

13 There has been some suggestion by the plaintiff in this
14 case that the TCPA somehow overrules, the Telephone Consumer
15 Protection Act, somehow overrules thirty-four years of
16 administrative law as to how the FCC and the courts have to
17 go and to work together. And I brought the grant of
18 jurisdiction language in -- I'm sorry, Your Honor, in (b) (3)
19 of 47 U.S.C. § 227, which indicates essentially a private
20 right of action may be brought. It says nothing about
21 overruling the exclusive jurisdiction of the court of
22 appeals. It says nothing about state courts having
23 exclusive jurisdiction over issues which raise the validity
24 of FCC orders.

25 Now, the courts, federal courts, have not wanted to

1 have TCPA actions in front of them. They have declined
2 jurisdiction in those cases and ruled that state courts have
3 exclusive jurisdiction over TCPA actions. That doesn't have
4 anything to do with the validity of FCC orders. They have
5 exclusive jurisdiction over TCPA actions. There's a case
6 out there, which is in Exhibit 21 I believe of your packet,
7 or 20, it is the case of *Southwestern Bell Telephone Company*
8 *vs. Arkansas Public Service Commission*. This case is cited,
9 and it cites a number of Supreme Court cases on this issue.
10 On page -- do you see that case, Your Honor, *Southwestern*
11 *Bell*? It's an Eighth Circuit case, and I think I may have
12 it at Exhibit 21 in your packet or Exhibit 20. There it is.

13 THE COURT: Yes.

14 MR. LEFKOW: Okay. If you look on page 4, the court
15 held, it is well established that where a statute
16 specifically provides for exclusive jurisdiction in one
17 court, as 28 U.S.C. § 2342 does -- see where I'm at, Your
18 Honor?

19 THE COURT: Yes.

20 MR. LEFKOW: It is well established that where a
21 statute specifically provides for exclusive jurisdiction in
22 one court, as 28 U.S.C. § 2342 -- which is the statute at
23 issue here, given the court of appeals exclusive
24 jurisdiction -- as that statute does, the specific grant of
25 jurisdiction takes precedence over a general grant of

1 jurisdiction.

2 Look again at -- if we look at 227, which I handed you,
3 the TCPA, Your Honor, and if we just line those up with
4 Exhibit 12, the Hobbs Act, you'll see that the Hobbs Act in
5 Exhibit 12 --

6 THE COURT: Uh-huh [yes].

7 MR. LEFKOW: -- is a specific grant of jurisdiction to
8 the court of appeals to determine the validity of FCC
9 orders. The TCPA is a grant of a private right of action
10 under a limited statute. Therefore, the specific grant of
11 exclusive jurisdiction in 2342 beats out the general grant
12 of jurisdiction in 227. And to suggest that in one statute
13 the United States Congress decided to give state courts the
14 jurisdiction they've never given to district courts is --
15 is a tough proposition to swallow.

16 It has been thirty-four years since *Port of Boston*,
17 the *Port of Boston* decision came out, and it has been
18 administrative law for thirty-four years that if you have a
19 problem with an FCC order, whether it is because you think
20 they are acting beyond their jurisdiction or they have no
21 jurisdiction to act or they are saying something they
22 shouldn't say, you have to go to the FCC or else there is
23 no subject matter jurisdiction over the action. That
24 essentially attempts to punish people for what is the
25 outcome of an FCC order.

1 I also want to alert the Court that there are pending
2 proceedings which, if this Court does not stop these
3 proceedings which would -- this Court would be interfering
4 with in front of the FCC. On -- in Exhibit 18 there is a
5 letter ruling from the FCC dated April 16th, 2004. And on
6 page 2 of that order it makes it clear the FCC is currently
7 taking petitions to reconsider its rules regarding fax
8 advertising and whether there should be an established
9 business relationship exemption. The commission currently
10 is considering petitions that seek to retain the established
11 business relationship exception or require methods other
12 than a signed written statement to demonstrate prior express
13 consent to receive fax advertising.

14 Essentially, Your Honor, our position is simple. Any
15 court which has this case properly before it has a duty to
16 either dismiss the case or stay further action in the case
17 pending the outcome of the administrative remedies which
18 they are required to exercise. To require Staples to
19 undertake class discovery in a case where the court has no
20 jurisdiction would be to be an unwitting tool for the
21 plaintiff to essentially go on a fishing expedition from a
22 company he's got no business getting anything from until
23 he's gone to the FCC. If the plaintiffs had cared to
24 research the issue before they filed this action, this Court
25 would not be in this dilemma. And they have placed this

1 Court in kind of an untenable position in conflict with an
2 agency, a federal agency, and in conflict with the federal
3 courts of appeals.

4 Staples and Quick Link are trying their best, and I am
5 trying my best to do whatever I can to say to this Court
6 that it is required to stop. And I want to create a record,
7 even if my prayers are not answered, I want to create a
8 record that I have done so. We are hesitant to do anything
9 to create a direct conflict between these agencies, as the
10 plaintiff has done, and we want to give this Court and this
11 jurisdiction every opportunity to rule on this subject
12 matter jurisdiction which is its threshold inquiry and
13 which it is required to perform. And what we are asking the
14 Court to do is to stay this action. We are asking the Court
15 to enjoin further prosecution of this action, enjoin further
16 discovery obligations in this action, which is the only
17 other available option besides dismissal. The Court on its
18 own consideration could dismiss the case. What we are
19 asking for right now is to make the plaintiff do what he
20 should have done in the first place, is to go to the FCC and
21 be a part of these proceedings and petition the FCC.

22 So, therefore, we would ask that this case be stayed.
23 We would asked that plaintiff be enjoined, at the very
24 least, for a period of thirty days from further prosecution
25 of this action, and that Staples not be required to

1 undertake burdensome class discovery for a case which this
2 court has no subject matter jurisdiction over.

3 THE COURT: And you sought the summary judgment prior
4 to seeking the TRO and the interlocutory injunction?

5 MR. LEFKOW: Yes, Your Honor. I sought summary
6 judgment based on the FCC orders. The plaintiff, for the
7 first time, raised his contention that we're not bound by
8 it, this Court should declare no such exemption exists. No
9 citations for any proposition that they could get such
10 relief, but that was the first time they did it. And I want
11 to make sure that this Court has it fully briefed before it,
12 that it has every opportunity and sees that it is -- there
13 are Supreme Court authority directly on point saying that
14 this action can't go forward.

15 The summary judgment motion is on reconsideration as to
16 another case that came out in the court of appeals, not on a
17 subject matter jurisdiction issue. So this case and this
18 proceeding is the only place where this is at issue. And
19 the reason we are seeking this relief now is because we want
20 -- if we are denied the relief, we certainly want -- don't
21 want to restrict appellate courts to give us relief in five
22 days or we have a \$2.2 billion judgment against us or a \$6.7
23 billion judgment against us. Every court that needs to
24 consider it should have as much time as they can to
25 consider.

1 And there's no prejudice to them from this going up any
2 chains, you know, or stopping in this court with a stay.
3 There is no prejudice to them, there's no prejudice to their
4 client, there is no prejudice to the numerous supposed class
5 members either, because they are not receiving faxes, to my
6 knowledge. No one -- I can state, in Georgia, there are no
7 faxes going out to Staples customers, which is essentially
8 -- the problem with that is that it is chilling Staples'
9 rights to act under the FCC orders. So, that's the effect
10 of this -- this proceeding.

11 We want some kind of relief and we beg of the Court for
12 some kind of relief before we are forced to let them come to
13 Massachusetts to interview our corporate representatives for
14 a case where there's no subject matter jurisdiction, before
15 we are required to tell them how many people we're sending
16 advertisements to, before we are required to answer
17 questions about our advertising campaigns and how we do
18 business. That is patently improper to seek that kind of
19 relief and to use this court as a tool to get at that
20 information, because this court lacks subject matter
21 jurisdiction. So we want something in place before, if
22 possible, we would like something in place before it comes
23 to a head. And we don't want -- my client should not have
24 to teeter on the edge of this kind of ruinous judgment where
25 the court should have stopped from the get-go, from the